October 6, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of New York

Date of Filing: August 8, 2008

Case Number: TFA-0271

This Decision concerns the State of New York's (New York) Appeal from a determination that the Department of Energy's Office of Electricity Delivery and Energy Reliability (OE) issued to it on July 3, 2008. In that determination, the OE responded to New York's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In its determination, the OE withheld information from 36 documents, under FOIA Exemptions 4 and 5. If we grant this Appeal, the OE may not withhold the information under FOIA Exemptions 4 and 5.

I. Background

New York filed a request with the OE for correspondence the DOE had with CRA International and transmission developers or stakeholders regarding an August 2006 Congestion Study and an October 2007 National Interest Electric Transmission Corridor [NIETC] Designation Order. Determination Letter. The OE provided 82 responsive documents in a numbered index. The documents consist of e-mails and memoranda among the OE, CRA International, and additional consultants that discuss the August 2006 Congestion Study and an October 2007 NIETC Designation Order. The OE redacted 36 of the documents pursuant to FOIA Exemptions 4 and 5, identified as Documents 8, 14, 16, 19, 22, 23(a), 23(b), 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 47, 48, 50, 51, 53, 58, 59, 59(a), 60, 60(a), 62, 63(a), and 64(a). In particular, the OE redacted Document 59(a) pursuant to Exemptions 4 and 5. It redacted the other documents pursuant to Exemption 5. *Id*.

New York then filed the present Appeal with the Office of Hearings and Appeals (OHA). Appeal Letter; E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. New York advances six arguments to show that the OE improperly withheld information under Exemptions 4 and 5. First, New York contends that the DOE waived its exemption claims regarding certain documents because the DOE already officially disclosed them to the public. In particular, it argues that the DOE disclosed Documents 8, 14, 16, 19, 22,

23(a), 23(b), 47, 53, 58, 59, and 60. Second, New York contends that the OE may not withhold Document 59(a) under Exemption 4 because Document 59(a) does not contain confidential commercial information. Third, New York contends that the OE cannot withhold certain communications under Exemption 5 because CRA International acted in its own interest, rather than the government's interest.[1] In particular, these communications are contained in Documents 25-29, 32-40, 43, 48, 50-51, 53, 58, and 62-64. Fourth, New York contends that the OE may not withhold any of the information under Exemption 5 because it does not contain predecisional, deliberative communications. Fifth, New York contends that the OE applied Exemptions 4 and 5 too broadly; the OE must disclose non-exempt, segregable facts. Finally,[2] New York contends that disclosing all of the withheld information is in the public interest. *Id*. We address New York's arguments in turn.

II. Analysis

The FOIA requires federal agencies to disclose information upon request, unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Waiver

New York argues that the OE has waived its exemption claims regarding Documents 8, 14, 16, 19, 22, 23(a), 23(b), 47, 53, 58, 59, and 60, because it has already officially disclosed those documents to the public. Appeal Letter; E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008.

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[1] New York raised this argument on September 2, after it filed its Appeal with OHA. *See* E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. When an appellant raises a new issue in an ongoing FOIA appeal, OHA's office policy allows an additional twenty working days to address the issue. Because we received New York's e-mail submission on September 3, our deadline for issuing this Decision became October 1. New York subsequently granted OHA an extension until October 6 to issue its Decision. *See* Memorandum of Telephone Conversation between Maureen Leary, Attorney, State of New York, Office of the Attorney General and David M. Petrush, Attorney-Examiner, OHA, Oct. 2, 2008.

[2] New York also appealed "DOE's failure to timely respond to the State's FOIA request." Appeal Letter. The DOE FOIA regulations do not allow OHA to review the timeliness of the determination issuer's response. If New York properly submitted a FOIA request and an authorizing official did not respond within the statutory deadline, it has a right of review in federal court. *See* 10 C.F.R. §§ 1004.5(d)(1)-(4).

New York also states that the OE did not disclose Documents 54(a), 54(b), and 55, despite indicating on its index that it intended to disclose them. *See* E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. New York states that it has contacted the OE to obtain these documents. *Id*. On remand, we will require the OE to disclose these documents, if it has not already done so.

An agency waives a valid exemption claim when it has "officially acknowledged" a document. An official acknowledgment must meet three criteria. First, the information requested must be as specific as the information previously disclosed. Second, the information requested must match the information previously disclosed. Third, the information requested must already have been made public through an official and documented disclosure. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). We read "an official and documented disclosure" to mean an authorized disclosure. *EverNu Tech., LLC*, 30 DOE ¶ 80,112 (TFA-0243) (Mar. 5, 2008).

A requester asserting a claim of prior disclosure has the initial burden of identifying specific information in the public domain that appears to duplicate the information that the agency is withholding pursuant to an exemption. *Wolf*, 473 F.3d at 378. A requester cannot rely on mere speculation. *Id.*

New York meets its initial burden of identifying specific information in the public domain that appears to duplicate the information that the OE is withholding by pointing to the withheld documents themselves. That is, New York argues that the withheld documents show that they have been communicated to members of the public: Document 8 is an e-mail to Doug Larson of the Western Governor's Association; Documents 14 and 19 are e-mails to Alison Silverstein, who is a former DOE employee; Document 16 is an e-mail to Brian Parsons of the National Renewable Energy Laboratory; Document 22 is an e-mail to Ken Jurman, an employee of the State of Virginia, and Mitch King of the Old Mill Power Company; Documents 23(a) and 23(b) were e-mailed to an individuals at Cornell University, the Tennessee Valley Authority, and the Bonneville Power Administration; Document 47 is an e-mail to Jay Loock, ostensibly of the Western Electricity Coordinating Council; Document 53 is an e-mail from Poonum Agrawal of the DOE to Alex Rudkevich of CRA International, that discusses questions raised by the State of Ohio; Document 58 is an e-mail to Alison Silverstein and Joe Eto, ostensibly of JBL; and Documents 59 and 60 are e-mails to Kurt Conger of Energy Expert Services, Inc.

Because New York points to the documents themselves to show that they have already been made public, the documents necessarily satisfy *Wolf*'s first and second requirements, that the information match and be as specific as the information previously disclosed. *Wolf*'s third requirement is at issue here – whether the information has been made public through an official and documented disclosure.

In order to evaluate New York's waiver argument, we contacted the OE to gather more information about the e-mail recipients. The OE informed us that the e-mail recipients of all documents except Document 60 are DOE subcontractors or consultants. *See* E-mails from Mark Whitenton, Deputy Assistant Secretary, Permitting, Siting and Analysis, DOE, to David M. Petrush, Attorney-Examiner, OHA, Sept. 9 and 11, 2008; e-mail from Theresa Brown Shute, Admin. Program Specialist, OE, to David M. Petrush, Attorney-Examiner, OHA, Sept. 11, 2008. Because the e-mail recipients in the documents other than Document 60 did not receive the e-mails as members of the public but as DOE subcontractors or consultants, New York has not shown that the OE has made the

information public through an official and documented disclosure. Therefore, the OE has not waived its exemption claims regarding those documents.

The OE has agreed to disclose Document 60 to New York because it has already disclosed it to members of the public. The OE will disclose Documents 59(a) and 60(a) for the same reason.[3] *See id.*

B. Exemption 5

The OE withheld Documents 8, 14, 16, 19, 22, 23(a), 23(b), 25-30, 32-40, 43, 47-48, 50-51, 53, 58-59, 62, 63(a), and 64(a), under Exemption 5, because the documents contain predecisional, deliberative communications. New York argues that the OE improperly withheld these documents because CRA International, the contractor who participated in the communications in Documents 25-29, 32-40, 43, 48, 50-51, 53, 58, and 62-64, had a conflict of interest. New York also argues that the OE erred in withholding the documents pursuant to Exemption 5 because the documents do not contain predecisional, deliberative communications. Appeal Letter; E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008.

1. Authority

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8.

Information satisfies *Klamath*'s first condition if it is an inter-agency or intra-agency communication. *Id*. at 9 (citing 5 U.S.C. § 552(b)(5)). The statutory definition of "agency" is broad, and includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency." *Klamath*, 532 U.S. at 9 (citing 5 U.S.C. § 552(f)). Information prepared outside the government by a government consultant qualifies as an "intra-agency" communication except when the consultant urges the agency to support a position "that is necessarily adverse to the interests of [the consultant's] competitors." *Id*. at 14.

Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," including the deliberative process privilege. *Id*. at 8 (citations omitted). An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "[Information] . . . is 'predecisional' if it precedes, in

[3] Because the OE has waived its exemption claims regarding Documents 59(a), 60, and 60(a), we need not determine whether the OE properly withheld them pursuant to Exemptions 4 or 5.

temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id.* Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id.* The agency must identify the role the information plays in that process. *Hinckley*, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id.*

The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id.* The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id.* (citation omitted).

2. Whether the DOE Contractor's Conflict of Interest Defeats the OE's Claim of Exemption 5

New York argues that the OE improperly withheld information in Documents 25-29, 32-40, 43, 48, 50-51, 53, 58, and 62-64 because CRA International, the DOE contractor who participated in the communications contained in the documents, had a conflict of interest. *See* E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 2, 2008. In particular, New York alleges that on September 26, 2006, CRA International entered into a contractual relationship with a power transmission developer, NYRI. E-mail from Maureen Leary, Attorney, State of New York, Office of the Attorney General, to David M. Petrush, Attorney-Examiner, OHA, Sept. 15, 2008. New York also alleges that CRA International represents "numerous" additional transmission developers and a trade

organization for transmission developers. Finally, New York alleges that NYRI and the other transmission developers have an interest in the August 2006 Congestion Report and October 2007 NIETC designation that the DOE consulted CRA International to help prepare. *Id*.

In *Klamath*, the United States filed a water rights claim in a state court on behalf of the Klamath Tribe. *Klamath*, 532 U.S. at 5. The Department of the Interior (DOI) and the Klamath Tribe exchanged written memoranda on the scope of the tribe's claims. *Id*. A non-profit water users association that neighbors the tribe filed a FOIA request for the written memoranda between the DOI and the tribe. *Id*. at 7.

The Supreme Court held that the DOI could not rely upon Exemption 5 to withhold the written memoranda between the DOI and the tribe. *Id*. at 15. The court reasoned that the tribe did not communicate with the DOI as a disinterested agency employee would have; rather, the tribe acted as "self-advocates at the expense of others seeking [water] benefits that were inadequate to satisfy everyone." *Id*. at 12.

Here, CRA International's alleged conflict of interest does not meet the narrow facts of *Klamath* that are necessary to defeat the OE's claim of Exemption 5. That is, even if indeed CRA International does have a conflict of interest stemming from its power transmission developer clientele – which has not been shown – New York has not alleged that the conflict of interest disadvantages those seeking benefits inadequate to satisfy everyone. Therefore, we cannot find that CRA International's alleged conflict of interest defeats the OE's withholding of information under Exemption 5.

3. Whether the Information that the OE Withheld Contains Predecisional, Deliberative Communications

New York argues that the OE improperly withheld information in each of the documents pursuant to Exemption 5 because that information does not contain predecisional, deliberative communications. *See* Appeal Letter.

We find that the OE properly withheld the information in Documents 8, 14, 16, 22, 23(b), 25, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 47, 48, 50, 51, 53, 58, 59, 62, 63(a), and 64(a). We also find that the OE properly withheld the information in Documents 19 and 27, except the information that is segregable, as detailed below. These e-mails and memoranda are all similar in that they consist of the authors' opinions and recommendations regarding power line congestion and transmission issues, and factual material that the authors relied upon in forming those opinions and recommendations. The material is clearly predecisional, and deliberative in that it reflects the "give and take" of the decision-making process.

Document 23(a) is entitled "Defining and Measuring Transmission Corridors: Technical Plan for the DOE Congestion Study." Document 26 is entitled "Analysis of Implications of Transmission Congestion in PJM and NYISO." We will remand the portion of New York's Appeal regarding these documents so that the OE may issue a new determination to explain whether the OE has adopted them, formally or informally. That is, if the OE

entirely adopted Document 23(a) or Document 26, the OE would not be able to withhold those documents under Exemption 5.

4. Segregability of Factual Information

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

We carefully reviewed the withheld information and found non-exempt, segregable information in Documents 19 and 27. Regarding Document 19, the OE withheld the entire first page and portions of the third page, which discuss logistical planning details for a meeting. Certain details reflect upon the agency's decision-making process, and are therefore deliberative. These include the specific list of invitees, which could indicate the character of the discussion at the meeting. However, the bare logistical planning details, such as whether the meeting room has been reserved and who issues the invitations, do not reflect upon the agency's decision-making process. Therefore, we find that the OE must disclose this information. In particular, we find that the OE must disclose all information on the first page, including and above the sentence that begins, "[A]ny luck getting the rooms yet?"

Regarding Document 27, the OE withheld information on the bottom of the first page, consisting of an e-mail from Alex Rudkevich to Poonum Agrawal, sent December 18, 2006, at 8:27am. The first sentence describes a memorandum in response to particular comments from either a member of the public or a DOE consultant. This information is deliberative because it associates the e-mail's author with a position that the DOE took in response to particular comments. However, the second and third sentences merely include the e-mail author's meeting availability and his desire to discuss the scope of the project's remaining work, which is a very general topic. Therefore, we find that although the OE properly withheld the first sentence, the OE must disclose the second and third sentences.

C. Discretionary Public Interest Disclosure

The DOE regulations provide that the DOE should release information exempt from mandatory disclosure under the FOIA if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1.

In this case, the release of the predecisional, deliberative information that the OE withheld could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. We do not believe that discretionary release of the properly withheld material would be in the public interest. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 (Mar. 18, 1987) (Case No. KFA-0080).

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York (New York), Case Number TFA-0271, is hereby denied regarding Documents 8, 14, 16, 22, 23(b), 25, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 47, 48, 50, 51, 53, 58, 59, 62, 63(a), 64(a), and portions of Documents 19 and 27, as explained below.

(2) New York's Appeal is granted in part regarding Documents 19 and 27. The Office of Electricity Delivery and Energy Reliability (OE) must disclose portions of those documents, as indicated in the discussion above, or issue a new determination justifying their withholding.

(3) New York's Appeal is hereby granted regarding Document 59(a), 60, and 60(a). The OE shall disclose these documents to New York.

(4) New York's Appeal regarding Documents 23(a) and 26 is remanded to the OE. The OE shall issue New York a new determination, explaining whether the OE has fully adopted them, either formally or informally.

(5) New York's Appeal regarding Documents 54(a), 54(b), and 55 is remanded to the OE, for the OE to disclose these documents to New York, if it has not done so already.

(6) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 6, 2008